Skeptical Challenges to International Law

International law differs in many respects from the legal system of a well-functioning modern state. The rules of international law do not come from a global legislature but from bilateral and multilateral treaties, and from customary rules that crystalize evolving state practice. State consent plays a fundamental role in shaping and legitimizing international law. Even the International Criminal Court, whose jurisdiction involves crimes of the greatest concern to the international community, such as crimes of aggression and crimes against humanity, still largely depends on states' voluntary submission to its authority. Finally, with the rare exception of uses of force or economic sanctions authorized by the United Nations Security Council, enforcement in international law largely takes the form of self-help.

These differences have invited a number of skeptical challenges to international law, three of which we explore in this essay. The first points to one or more of the deviations of international law's institutional structure from that of a modern state's legal system as a basis for denying that international law is really 'law.' Central to the debates over international law's status as law are concerns about whether and why the concepts of law inherited from domestic legal systems should serve as the blueprint for theorizing law in general, and international law in particular.

The second skeptical challenge targets international law's legitimacy. What reason(s) do actors have for treating international legal norms, or the exercise of political power by international institutions, as anything other than an attempt by states to advance their national interests, or perhaps the interests of powerful non-state actors such as multi-national corporations? Why think actors have any moral duty to respect or obey international law or legal institutions, as opposed to merely prudential reasons to do so? Following a brief description of recent debates over how we ought to understand the concept of legitimacy when used to assess international political practices or global governance, we survey several possible bases for a moral duty to obey or respect international law. These include state consent, the service conception of legitimate authority, and global democracy.

The third set of challenges focuses on the relationship between state sovereignty and international law. In Germany v Italy, the International Court of Justice required Italy to make changes in its domestic legislation or to take measures with the same effect to accommodate the decision by the court to uphold Germany's sovereign immunity.[1] This is a clear example of an international institution making demands for reform affecting the domestic law of a state in order to elicit compliance with international law. Are there limits to what international law can require of states? What are the boundaries of states' prerogatives to make their own rules? Should those boundaries be defined by general international rules or are they a matter of purely internal exercises of democratic self-creation? Skeptics argue that the rule of international law is incompatible with states' political self-determination. Regardless of whether their defense of this claim ultimately succeeds, thoughtful engagement with it may well require us to rethink some of

[1] Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening) 2012.

the fundamental concepts and normative ideals in political philosophy, including state sovereignty, democracy, individual rights, political authority, and political obligation.[2]

SECTION 1: Is International Law Really Law?

Many contemporary scholars give short shrift to the question of whether international law is really law. Some, like the prominent international legal theorist Thomas Franck, assert that we now live in a "post-ontological" era, where the existence of a genuinely legal international order can be safely presumed, and theorists can focus instead on investigating whether international law is effective, enforceable, understood, or fair (Franck, 1998, p. 6). Others suggest that it makes no difference whether international law is really law, since we can still ask whether the norms, practices, and institutions commonly but perhaps inaccurately referred to as international law are fair, legitimate, or just (Buchanan and Golove, 2002, p. 878). These responses treat the question "is international law really law?" as a theoretical one, a matter of the category in which we ought to place international law when we offer a description of the universe. Admittedly, certain treatments the concept of law, and the question whether international law is really law, invite such a reading. Nevertheless, we maintain that this mischaracterizes international legal skepticism. Typically, those who question whether international law is really law, or better yet, who assert that it is not, do so as part of a practical argument, one intended to support a particular conclusion regarding what some agent, such as a state (official), should or should not do. Put another way, implicit in the skeptical challenge to international law is an assumption that law makes, or at least is capable of making, a distinctive contribution to human deliberation, and so to the production of social order. When a person argues that international law is not really law, she implies that international law does not, and perhaps cannot, matter in the way that law matters (Hathaway and Shapiro, 2011, pp. 255-6). Ironically, then, in investigating whether international law is effective, enforceable (or enforced), understood (or determinate), or fair, Franck actually directly addresses many international legal skeptics, who maintain that international law lacks one or more of these properties and argue (or assume) that possessing them is necessary and/or sufficient for the existence of genuine law (Kleinfeld, 2010; Lefkowitz, unpublished manuscript).

The question of whether international law is law was raised most incisively in the 19th century by the legal philosopher John Austin, who famously maintained that it was not. On Austin's account, law exists as the command of the sovereign, where commands are understood as orders backed by the threat of coercive sanctions in the event of non-compliance (Austin 2012, 36). A sovereign is someone who is habitually obeyed by others but does not habitually obey anyone else. Since international law does not possess a sovereign that issues commands, Austin concludes that it does not qualify as law (2012, 188-89, 231-32).

Austin's 'command theory' of law has been repeatedly challenged, though it remains the intuitive approach of most of those who are new to the study of international law. But some corners of the scholarly profession also hold on to this view. Realist international relations

[2] In this brief article we focus almost exclusively on arguments advanced by legal and political philosophers working in what might be called the Anglo-Saxon analytical tradition. We strongly encourage readers interested in the topics discussed in this essay, or in the philosophy of international law more generally, to explore the many schools of thought in the field of international legal theory (for an overview, see Orford et al., 2016; Bianchi, 2016).

scholars take the lack of centralized enforcement, the fragmentation of international treaty regimes, and the (alleged) fact that states are only bound by international law with their consent as proof that international law does not constrain states in the manner that genuine law must. These skeptics view international law as at best a policy tool to advance the interests of powerful states and at worst as a form of cheap talk that encourages little change in behavior and even less cooperation among nations. We develop this point below. In the most recent iteration in the long running debate over the conceptual connection between law and coercive enforcement, Oona Hathaway and Scott Shapiro (2011) respond that Austin-style critiques of international law's status as law rest on an excessively narrow conception of law enforcement, one that conflates it with the distinctive mode of law enforcement realized in a modern state.

In his brief discussion of international law, H.L.A. Hart (2012) attempts to dispel certain mischaracterizations of international law that flow from what he maintains are bad legal theories. Foremost among these is Austin's claim that international law is not really law, but only positive morality. Hart maintains that the failure of the command theory to accurately describe municipal legal orders, which he assumes are paradigmatic examples of law, provides a compelling reason to reject it as an analysis of international law as well (Hart, 2012, pp. 216-32). Therefore, the fact that international law does not satisfy the command theory's criteria for law does not warrant international legal skepticism. Hart also criticizes certain defenders of international law's status as genuine law, however. He argues that attempts to identify international legal analogs to the practices of legislation, compulsory adjudication, and centrally organized sanctions present in a municipal legal system rest on a mistaken assumption that such institutions are necessary for the existence of a genuine legal order (Hart, 2012, pp. 232-3). Hart also rejects Kelsen's claim that international law must possess a basic norm, in virtue of which discrete international legal norms constitute a system of law.[3] Rather, international law comprises only a set of rules, and those rules count as law simply because states accept them as such, not because they have been enacted in accordance with some more basic norm (Hart, 2012, pp. 233-7).

Hart provides as an alternative theory of the nature of law and consequently a different answer to the question of whether international law is law. On Hart's theory, a legal system must meet two minimal conditions: the primary rules of obligations are obeyed by most of the law's subjects, and the secondary rules that explain how primary rules are made, changed, and interpreted are generally accepted by public officials (Hart 2012, 116). The rule of recognition is a special kind of secondary rule that plays a fundamental role in Hart's theory, as the rule that explains the validity of all other rules within the system. It is usually unstated but it is assumed in the way public officials deploy it to identify other secondary rules and all of the primary rules of the legal system. For example, Hart describes the rule of recognition in England as 'whatever the Queen in Parliament enacts as law is law' (Hart 2012, 102).

Hart argues that international law lacks a rule of recognition, and therefore lacks the status of a legal system. Unlike domestic law, international law is merely a set of primary rules of obligations that are not united by secondary rules (Hart 2012, 214). There is some debate about whether Hart was correct in his assessment of international law. Criticisms of Hart's treatment of international law fall into two categories: those that broadly accept Hart's analysis of law but maintain that he misapplied it when describing international law, and those that point

[3] For reasons of space, we do not discuss Kelsen's (philosophical) treatment of international law, or the work of contemporary Kelsenian international legal theorists. Both merit attention, however; see, e.g., Kelsen 1967; von Bernstorff 2010; Kammerhofer 2011.

to shortcomings in Hart's account of international law as evidence of deficiencies in his characterization of law. The former typically challenge Hart's description of international law as akin to a simple, or primitive, social structure, one consisting only of primary rules of obligation, and/or his claim that international law lacks a rule of recognition (Waldron, 2013; Payandeh, 2011; Pavel 2018). Yet if we look past a certain sloppiness in the presentation of his argument, it is possible to construct a sympathetic reading of Hart's take on international law, one that trades on the distinction between a hierarchy of norms – present in international law – and a hierarchy of agents, which international law largely does without (Lefkowitz, 2017; Nardin, 1983). This latter feature explains why international law's capacity to contribute to the production of social order differs from, e.g., that of a moderately well-functioning modern state's domestic legal order, with important implications for its utility as a means for realizing justice (Hart 2012, p. 220). Among those who advance the latter type of critique, some maintain that the challenge of identifying international legal officials offers a compelling reason to reject Hart's analysis of law and a legal system, which they maintain ties those concepts too closely to the concept of the state (Culver and Guidice, 2010; Collins, 2016).

Not surprisingly, Ronald Dworkin also finds fault with Hart's analysis of international law, and more generally, with a legal positivist approach to addressing the skeptical challenge to its status as genuine law. Dworkin quickly dismisses Hart's discussion of international law on the grounds that it addresses a classificatory dispute of little practical import (Dworkin, 2013, pp. 4-5). The far more important question – for legal officials, subjects, and philosophers – is a practical one, namely "how should we identify what the law is?" To answer that question, we need an account of the grounds of law; e.g. an account of what makes it the case that a given actor possesses, or does not possess, a legal right. Orthodox international legal positivists identify state consent as the property that confers legal validity on a rule or standard, but Dworkin offers a number of reasons to think such a view mistaken (Dworkin, 2013, pp. 6-10). For example, it fails to account for (or distorts) the process of customary international law creation, as well as the nature of *jus cogens* norms, i.e. international legal norms from which states may not derogate. Dworkin is hardly the first to advance these objections, and more sophisticated positivist accounts of international law, which do not limit the social facts that make law to state consent, may avoid many of them. However, they too may be vulnerable to Dworkin's argument that a legal positivist account of international law offers insufficient guidance on how to interpret international legal materials such as the U.N. Charter.

Suppose international law consists of the rules to which states have agreed; few deny this is true for much of international law, even if not for all of it. Dworkin's view is that where there is no consensus on the meaning of the law, there is no law. What follows for international law is that there is no law where there is no consensus regarding the meaning of a treaty provision, or the content of a customary international norm. Rather, in such cases international legal actors enjoy discretion, the freedom to act as they think morally best. Dworkin suggests this sort of indeterminacy, where the content of international law cannot be determined by a shared understanding among states (and other international actors, such as judges on the International Court of Justice) is quite common. If true, the exceedingly large number of "gaps" in international law brings us quite close to the skeptical conclusion that there is no international law. In order to defend the reality of international law, he concludes, we must abandon legal

positivism and instead embrace an interpretivist account of law as a semi-structured, moralized, practice of argumentation (Dworkin, 2013, pp. 10-13).[4]

For Dworkin, a finding of law is an answer to a specific moral question, namely which political rights and obligations may a given political community's coercive institutions enforce on demand, i.e. without the need for any further collective political decision? (Dworkin, 2013, p. 12). Specific conclusions, e.g. regarding the legality of unilateral humanitarian intervention, are the product of a constructive interpretation of international legal materials in light of the moral purpose we ought to attribute to the practice of global coercive rule. That purpose, Dworkin contends, is to diminish the dangers the Westphalian conception of state sovereignty poses to basic human rights (Dworkin, 2013, pp. 16-19). These include domestic campaigns of crimes against humanity or genocide, international aggression, failures of international cooperation that result in environmental, economic, or health catastrophes, and cross-border domination. This duty to mitigate "the failures and risks of the sovereign-state system… provides the most general structural principle and interpretive background of international law" (Dworkin, 2013, p. 19). An attempt to identify specific international legal norms solely by appeal to this duty may fail to yield a determinate answer, however. Therefore, Dworkin identifies a second "fundamental structural principle" that ought to inform our constructive interpretation of the practice of global coercive rule. This principle of salience states: "if a significant number of states, encompassing a significant population, has developed an agreed code of practice, either by treaty or by other form of coordination, then other states have at least a prima facie duty to subscribe to that practice as well, with the important proviso that this duty holds only if a more general practice to that effect, expanded in that way, would improve the legitimacy of the subscribing state and the international order as a whole" (Dworkin, 2013, p. 19). On one reading, the principle of salience indicates a way in which backward-looking considerations of fit with past practice and doctrine ought to figure in the identification of international law. Yet Dworkin contends that due to its relative youth as a genuine legal order – a status he maintains it acquired only with the signing of the UN Charter in 1945 – appeals to political morality, such as the duty of mitigation, may well figure more prominently and regularly in the identification of international legal norms than is true of more mature legal orders (Dworkin, 2013, pp. 29-30).

Though only recently published, Dworkin's philosophy of international law has already attracted criticism. Thomas Christiano (2016), for example, maintains that Dworkin errs in identifying states' enhancement of their own, domestic, legitimacy, as the fundamental moral aim of international law, while also arguing that attributing such a purpose to international law does not warrant many of the conclusions that Dworkin draws. Adam Chilton (2013) contends that were international officials to adopt Dworkin's approach to identifying the law, states would be unwilling to sign up to treaties that could be interpreted in ways that would restrict their sovereignty, leading to an overall diminishment in international law's contribution to the goal of

[4] Among international legal theorists, the most influential proponents of the claim that international legal norms are indeterminate are Martti Koskenniemi (1989; 1990) and David Kennedy (1988). Neither would endorse Dworkin's account of how to proceed in the face of such indeterminacy, though the former's tentative endorsement of "constitutionalism as a mindset" (2007) is reminiscent of Dworkin's concluding characterization of law in *Law's Empire* as "a protestant attitude that makes each citizen [but especially lawyers and judges] responsible for imagining what his society's public commitments to principle are, and what these commitments require in new circumstances" (Dworkin 1986, p. 413).

advancing respect for basic human rights. Finally, Lefkowitz (unpublished manuscript) argues that given his general philosophy of law, Dworkin ought to have embraced international legal skepticism, and drawn on his account of how judges in a wicked legal system ought to exercise the powers attached to their offices to offer guidance to international officials.

SECTION 2: The Legitimacy of International Law

Philosophical investigations of international law's legitimacy focus on two questions. First, how ought we to understand the concept of 'legitimacy' as applied to international law and international institutions? Second, whatever the nature of legitimate rule, what conditions must an international legal norm or agent satisfy in order to be legitimate?

Concept of Legitimacy

On one common understanding, when we ascribe legitimacy to those who govern, or describe their conduct (e.g. legislating) as legitimate, we maintain that they enjoy a *right* to rule. Many legal and political philosophers characterize the right to rule as a claim to practical authority; roughly, as a right to determine what subjects may, must, or must not do, to which correlates a duty of obedience on the part of subjects. Others characterize the right to rule as a protected liberty to make, apply, and – especially – enforce the law. While subjects have no duty to obey the law on this understanding of the right to rule, they do have a duty not to interfere with any exercise of government that falls within the scope of the right.

Reflection on the legitimacy of international law and institutions has led some theorists to argue for the adoption of a broader characterization of legitimacy, one that does not draw a conceptual connection between political legitimacy and a right to rule (however understood) (Buchanan 2013; Held and Maffettone, 2016). The existing international political order contains a variety of actors, such as the International Committee of the Red Cross, the Human Rights Committee (which monitors compliance with the International Covenant on Civil and Political Rights), and the Basel Committee on Banking Supervision, who make no claim to practical authority, nor to being justified in the use of force. Yet these actors, and their conduct, are nevertheless appropriate targets of legitimacy assessments. Therefore, we ought to construe the concept of legitimacy broadly, as a claim to the forms of respect institutional actors need if they are to effectively contribute to coordinating actors in morally beneficial (or necessary) ways (Buchanan, 2013, pp. 175-88). One intriguing implication of doing so is the possibility that the conditions an institution must satisfy to qualify as legitimate will vary depending on the type of activities it undertakes in pursuit of this end (Buchanan, 2013, pp. 188-93).

Consent

Though state consent continues to figure prominently in discussions of international law's legitimacy, philosophers and legal theorists have long recognized its shortcomings as a basis for a general duty to obey existing international law (Buchanan, 2004; 2010; Buchanan and Keohane, 2006; Christiano, 2010; Pavel 2015, Lefkowitz, 2016b). The attractiveness of consent as a basis for legitimate rule lies in its alleged ability to reconcile a conception of agents as morally free and equal with their submission to authority. An actor's agreement to restrict his or her liberty has this consequence, however, only if it is undertaken voluntarily and intentionally. Yet the agreement of militarily and economically weak states to abide by the terms of various

international treaties may frequently fail to qualify as voluntary. Likewise, legal agreements entered into by insufficiently representative governments cannot place their citizens under a moral obligation to conform to the terms of those agreements. Moreover, political officials sometimes refuse to consent to international agreements meant to protect the interests of the citizens whose country they claim to represent, or of individuals in other countries, thus undermining the legitimacy of rules that ought to have more general applicability, such as those that define international criminal liability for grave human rights violations for example. This fact challenges the appropriateness of consent as the sole or even a necessary criterion for legitimacy.

While the aforementioned considerations indicate the limits of consent as a basis for international law's legitimacy, they do not exclude the possibility that some international legal actors currently have a consent-based moral obligation to obey some international legal norms (Lister 2011). Furthermore, an argument demonstrating that state consent is not always a condition for international law's legitimacy does not entail that it should never be. Indeed, several theorists have recently argued that a fully legitimate international legal order must accord state consent a central place, since only by doing so can it reconcile a moral duty to obey specific international legal rules, or to support specific international institutions, with respect for the exercise of self-determination by democratic states (Christiano 2010; Besson 2016).

Instrumental Justification

Samantha Besson (2009) and John Tasioulas (2010) both draw on Joseph Raz's service conception of authority to assess international law's legitimacy (Raz 1986; 2006). Roughly, states and other international legal subjects ought to defer to international law's specification of their rights, duties, powers, and immunities if (a) they are more likely to conform to the moral reasons that apply to them by doing so than by acting on their own judgment, and (b) it is more important that they act rightly than that they choose what to do for themselves. Where it serves to enhance international actors' conformity to right reason, and where such conformity takes priority over the exercise of self-determination, international law enjoys legitimacy.

One way international law provides this service is by correcting for ignorance or mistaken beliefs on the part of international actors. Multi-lateral treaties, for example, likely take into account more information, and suffer from less bias, than would be true of a judgment reached by any party to the treaty on its own. If so, then those parties will likely do better at acting as they have most (or undefeated) reason to act by adhering to the treaty than by acting on their own judgment. International law may also provide a corrective to volitional defects. For instance, by internalizing international legal norms governing the use of force, officials may be better able to resist the temptation to act in ways that benefit their state, or themselves, but that run contrary to the demands of justice. Finally, given deep disagreement over the precise demands of justice, international actors will often do better at conforming to the moral reasons that apply to them by adhering to common rules regarding, e.g., the use of force, territorial claims, international migration, or trade than they will by acting on their own moral judgment. After all, what one state determines to be a just war, or a morally permissible restriction on imports, may frequently strike other states as aggression, or morally impermissible protectionism. If states act on those judgments, the resulting conflicts will likely lead to even

graver injustices than those that will occur if all states conform to common rules governing war and trade, even if those rules deviate in certain respects from what justice truly requires.[5]

To our knowledge, no one who accepts the service conception of legitimate authority contests its application specifically to international law. However, a fair number of legal philosophers argue that the service conception fails to offer a compelling account of any law's legitimacy. (For a helpful survey of critical responses, see Ehrenberg 2011). One common objection, which may seem particularly pertinent to international law, concedes that the service conception may explain why state officials and other actors sometimes have good reason to comply with international law. However, the service conception cannot explain why international law, or better, the international community whose law it is, has a right to rule correlative to which is a duty to obey on the part of international legal subjects (Buchanan 2010; Darwall 2010; Hershovitz 2011). In response, defenders of the service conception argue that we should distinguish conceptually between the law's claim to its subjects' deference regarding their moral duties, and the agents entitled to the performance of those acts the law's subjects have a moral duty to perform. Suppose A has a moral right that B phi, and that B will do better at discharging this duty if she defers to C's judgment regarding what constitutes phi-ing, when B ought to phi, and so on, then if she acts on her own judgment. In this case, B's duty to phi is owed to A, not to C, and it is A who has a justifiable complaint if B fails to defer to C when she ought to (because that is the best way for B to ensure that she discharges her moral duty to A). If successful, this argument shows that it is a mistake to build into the very concept of legitimate practical authority the idea that the duty to obey is owed to the authority. Thus it is not necessarily the case that, in order to establish the legitimacy of international law, we must explain why the international community has a claim-right to its subjects obedience, or put the other way around, why the subjects of international law owe the performance of their international legal obligations to the international community (Enoch 2014, pp. 323-28 ; Lefkowitz, 2016a, pp. 209-11).

Allen Buchanan and Robert Keohane also argue that the legitimacy of international law ought to be assessed instrumentally, in terms of the contribution it makes to facilitating mutually beneficial coordination among states and other actors grounded in "their common capacity to be moved by moral reasons" (Buchanan and Keohane, 2006, p. 409). They then identify a set of substantive and procedural conditions global governance institutions must satisfy if they are to perform this task, which they label the Complex Standard of legitimacy. The substantive conditions include not persistently violating the least controversial human rights, and not intentionally or knowingly engaging in conduct at odds with the global governance institutions' purported aims and commitments. The procedural standards include mechanisms for holding global governance institutions accountable for meeting the aforementioned substantive requirements, as well as mechanisms for contesting the terms of accountability. To be effective, these mechanisms must be broadly transparent; e.g. information about how the institution works must be not only available but also accessible to both internal and external actors, such as inspectors general and non-governmental organizations.

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[5] Readers interested in exploring the perceived virtues and vices of employing the service conception to assess the legitimacy of international law may wish to investigate the recent debate over the proper relationship between the morality of war and the law of war. Jeff McMahan (2008) and Adil Ahmad Haque (2017) both use the service conception to morally assess the law of war, while Seth Lazar (2012) and David Rodin (2011) argue against doing so.

Arguably, Buchanan and Keohane combine an account of the justification for global governance institutions – why such institutions may be morally desirable, and so why we may have *pro tanto* moral reasons not to interfere with their operation, and perhaps to actively support them – with an account of what makes global governance institutions legitimate (Simmons 1999; Lefkowitz 2016b). If we ask why the actors over whom a global governance institution claims jurisdiction should treat its rules as presumptively binding simply in virtue of their having been issued by that institution, Buchanan and Keohane's answer seems to the be same as the service conception's, namely that those actors will do better at acting on the reasons that apply to them by deferring to the law than by acting on their own judgment (Buchanan and Keohane, 2006, p. 436). If so, then satisfying the Complex Standard is not what makes the rule of global governance institutions legitimate. Rather, the fact that a global governance institution meets the Complex Standard provides *evidence* that its attempt to govern satisfies the service conception of legitimate authority, while it is the satisfaction of the service conception that makes that institution's rule legitimate.

Democracy

Deference to law in circumstances characterized by reasonable moral disagreement regarding the terms on which people ought to interact with one another may also be justified non-instrumentally, on the grounds that it constitutes respect for others as moral equals. Vis-à-vis municipal or domestic law, arguments of this type typically require that the law be made democratically. By extension, it might be thought that democracy also provides a necessary, or at least a sufficient, condition for the legitimacy of international law (Held 1995; Archibugi, 2008). Yet Thomas Christiano, a defender of democracy as a necessary condition for the legitimacy of domestic law, argues against the moral desirability of a global democratic parliament (Christiano, 2010). For example, he maintains that global democracy would likely generate persistent minorities, and that the mechanisms developed at the state level to address this problem would be less effective in a globe-spanning polity. Partly, this is due to a second defect that would likely undermine the legitimacy of law made by a global democratic parliament, namely the absence of a robust global civil society, including institutions such as political parties that can mediate between individuals and officeholders. Last but not least, Christiano argues that individuals and communities have unequal stakes in the activities that are most often identified as in need of global regulation, such as trade and many (though not all) types of environmental pollution. A process for making law that gives all agents an equal say over matters in which they have very different stakes fails to advance the interests of all subjects in a publicly equal way. Yet Christiano maintains that only law that does so enjoys legitimacy.

David Held and Pietro Maffettone (2016) have recently offered qualified rebuttals to a number of these objections. While many turn on empirical claims, the authors also point out that equality or inequality of stakes in the regulation of a given activity is not simply a natural fact but the product of an institutional choice that stands in need of a justification. Therefore, it cannot be presumed to serve as an unproblematic premise in a moral argument against the pursuit of global democracy.

SECTION III. International Law and State Sovereignty

The question of whether international law institutions exercise *legitimate* authority over states is bound up with the concern that international law may unacceptably interfere with the

authority of sovereign states. This final question is motivated by an understanding of state sovereignty as a historical norm that protects the prerogatives of political communities to make their own rules independent of outside political or legal control. Sovereignty is thus primarily a right of states to govern themselves internally as they see fit. The skeptical challenge stems from the fact that international law is seen to unjustifiably restrict this right either by its very nature, or by the ways in which specific rules or decisions are made and imposed upon states by treaties and international organizations.

Ideals of political sovereignty have come a long way from their absolutist origins in the thought of 16th and 17th century political thinkers such as Jean Bodin, Samuel Pufendorf, and Thomas Hobbes. For example, we no longer believe as Hobbes did that political power divided internally will lead to instability and a state of perpetual war (Hobbes 1994, 119, 214). In fact, modern liberal democracies hold internally divided government as a precondition of peace and the protection of citizens' rights. But in relation to international law many continue to view the authority of states in absolute or quasi-absolute terms, and they reject any legitimate role for international law in shaping domestic politics.

Realists have long been skeptical of the place of international law in an anarchic system of states. According to realist scholars, states behave according to an internal logic of anarchy which requires them to prioritize survival. States ought to maximize their military and economic capacity, even at the expense of other states, and in so far as international law gets in the way of states pursuing their goals of maximizing power, it should be ignored and delegitimized (Krasner 2002, 267; Mearsheimer 1994, 12, 16, 48). 'New realists' such as Jack L. Goldsmith and Eric A. Posner echo these views of international law that see it as both ineffective and dangerous. They make both a descriptive claim that international law does not have any effects on state behavior, and a normative claim that states do not have obligations to respect international law but rather obligations to serve the interest of their citizens, which 'almost always produces a self-interested foreign policy' (Goldsmith and Posner 2005, 14, 84-91, 100-106). State institutions are set up by political communities to protect the welfare of their members. States have no obligation to follow international law except when it is in their interest to do so (Goldsmith and Posner 2005, 185–87).

Criticism of the 'new realists' has been swift and powerful. Jens David Ohlin has argued for example that Goldsmith and Posner ignore the fact that states are planning agents, and in virtue of their long-term view of their interests, engage in strategic cooperative behavior, that is in creating and complying with international rules, as a way to further their plans. Long term plans give states reasons to continue to affirm the choice of rules that best advance those plans, and their interests, even in the face of opportunistic short-term gains in defection. One function that law can serve is to ensure that the long terms strategic interests of agents are protected and advanced, and international law is no exception in this regard (Ohlin 2014, 119–53; Spiro 2014, 448–54). Thus, contrary to what Goldsmith and Posner argue, states better serve their interests and the interests of their citizens by strengthening and following international law rather than by engaging in short-term opportunistic gain. In fact, a proper understanding of states' role as fiduciaries of their citizens makes the idea of states' obligations to obey international law even more compelling, insofar as the latter contains powerful norms that protect human rights (Tesón 1998; Criddle and Fox-Decent 2016). In this latter understanding, state sovereignty is not maintly or primarily a rigth, but a duty, and international law and institutions can legitimately restrict state sovereignty to the extent to which states fail to uphold their duties to their citizens.

Political philosophers have been mostly preoccupied with understanding and justifying the internal dimension of states sovereignty, that of citizens' obedience to state institutions, and thus have paid little to no attention to external dimension of sovereignty, namely the question of how international law affects state sovereignty. Some political philosophers defend the primacy of states against cosmopolitan challenges in a way that could be read to support the realist rejection of international law. 'Statist' political philosophers argue that the state is the primary site of justice, and as a result, it owes primary allegiance to its citizens and the citizens to the state. In *Liberal Loyalty,* Anna Stilz portrays the state as the sine qua non of justice, without which individuals could not engage each other as moral equals and create institutions that protect their rights. Therefore, their first allegiance should go to its institutions, at least if they are citizens of liberal-democratic states, since they best approximate liberal ideals of justice that place freedom and equality at their center (Stilz 2009, 22, 81–84). Liberal nationalists such as David Miller and Margaret Moore defend a more expansive notion of national allegiance that does not depend on national states being liberal democratic. States deserve moral allegiance because they are unique projects of collective self-creation through which groups of individuals convert a common past and cultural identity into shared institutions that express and solidify social bonds (Miller 1997, 10–11, 67–79; Moore 2001, 28–31). Against cosmopolitans, who claim that individuals owe equal regard to humanity as a whole rather than to specific political communities, statists and nationalists defend special allegiances to state institutions because it is through these institutions that compatriots or co-nationals commit reciprocally to each other's wellbeing and to a joint, evolving conception of justice (Caney 2006, 25–62; Tan 2004, 40–61).

Several readings are available of the statist or nationalist positions, only one of which is sympathetic to the realist project. The more extreme reading, is that allegiance to the (nation-) state must be exclusive in order for citizens to properly express the intrinsic moral value of state membership. Nothing short of exclusive devotion to state institutions is warranted to cement the bonds of reciprocity, fairness, and justice. This 'incompatibilist worry' takes multiple forms, and Allen Buchanana and Russell Powell identify several versions worth considering (2008, 327–28). For incompatibilists, the value of constitutional democracy is 'so obvious and overwhelming," and the costs to self-determination so great and undeniable, that nothing short of the wholesale rejection of international law is called for (Buchanan and Powell 2008, 328). Although this reading is a logical extension of statist arguments, to our knowledge, none of the defenders of statism mentioned above are partial to it. In fact, most acknowledge the existence of obligations of justice beyond borders even as they defend the primacy of national ties. But it is still unclear whether their acceptance of moral obligations beyond borders translates into support for the authority of international law. This is because recognizing the authority of international law would require states and citizens to give primacy to some of its demands over the demands of their state institutions and laws, in other words to recognize that some concerns of global justice embodied in international law take priority. This is the position Carmen Pavel defends in her book *Divided Sovereignty*. In it she argues that international law can give a wide berth to states making their own rule but also use its authority to ensure that states fulfill their most basic sovereign responsibilities towards their own citizens. In fact, this understanding of the role of international law is consistent with the affirmation of the right to democratic self-governance, when citizens divide their allegiance between the institutions of their state and international institutions tasked with keeping the former in check (Pavel 2015, 33–44, 57–87).

The more extreme reading may be endorsed implicitely and unreflectively by some realists, who discount even state consent as a vehicle through which states become bound by

international law. One could deny that international law raises a problem for state sovereignty as long as states consent to the international rules they are bound by. But realists deny the value of state consent: state consent to international treaties is either 'cheap talk,' or an irrational pathway of commitment inconsistent with self-preservation, given that state rationality is defined narrowly as protecting the interests of the citizens in state survival. Commitment to international law is irrational for the same reason that commitment to rules by individuals in a Hobbesian state of nature would be irrational: in makes states vulnerable to the unscrupulous defection of other states in the absence of general effective enforcement (Waltz 1979, 93, 107). But liberal institutionalists and constructivists have persuasively shown that realists draw unreasonably strong conclusions from the characterization of international politics as an anarchic system (Keohane 1984; Nye and Keohane 1971; Wendt 1992). States face cooperation and coordination dilemmas that are best addressed through stable, long term international cooperation in the form of treaties and organizations, which are necessary to state survival and to a whole host of other interests that states have beyond survival.

The absence of a world government is treated as an explanatory variable by realists, but it is a cause for regret for political cosmopolitans, who argue that it is impossible for human beings to treat one another justly in the absence of a global state – e.g. because any international political order will necessarily expose some human beings to domination by others, or because some human beings will inevitably exercise morally inadequate input into the design of rules and institutions that shape their life prospects. These cosmopolitans are ultimately committed to the necessity of superseding an *international* legal order. States are obsolete political forms organized around parochial conceptions of justice, and they should give way to global institutions that define and implement a cosmopolitan conception of justice, according to which every human being is an object of equal moral concern regardless of their current political membership, cultural or religious identity, economic or social status. As a way to realize this ambitious vision, these theorists propose radical reforms to the existing institutional system in the form of a global democracy. International law, on this vision, would be the vehicle for the transition to a single, fully integrated world state which would realize the cosmopolitan ideal of justice (Marchetti 2008; Cabrera 2005; Tamir 2000; Gould 2004; Lu 2006). But moral cosmopolitanism, i.e. the view that we have some moral duties to all human beings as such, need not entail a commitment to political cosmopolitanism. In fact, plenty of theorists endorse gradual reform of the current state system through a process of constitutionalization or some other way to institutionalize a global structure that promotes and defends human rights without eliminating the existing plurality of legal orders (Cohen 2012; Benhabib 2011; Brock 2009).

The question of whether international law interferes unacceptably with the authority of self-governing democratic communities to make their own rules depends in large part on the weight of sovereignty in our judgments about the legitimate prerogatives of states against interference. At one end seem to be those who believe that the boundaries of legitimate state authority should be in large part determined or even dissolved by international law. At the other end are those who believe those boundaries are a matter of purely internal exercises of democratic self-creation. These questions invite us to rethink the contours of state sovereignty and consequently some of the fundamental concepts and normative ideals in political philosophy, such as individual rights, democracy, political authority and political obligation.

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